In the Supreme Court of the United States

OCTOBER TERM, 1969

No. 1455

FRANCIS DAVID WENZEL, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES

After a jury-waived trial in the United States District Court for the Central District of California, petitioner was convicted of having wilfully refused to obey the order of his local Selective Service board to submit to induction, in violation of 50 U.S.C. App. 462. He was sentenced to three years' imprisonment, subject to the parole eligibility provisions of 18 U.S.C. 4208(a)(2). The court of appeals affirmed *per curiam* (Pet. App. A) on the authority of its recent *en banc* decision in *Ehlert* v. *United States* (set forth at

Pet. App. B). Certiorari was granted by this Court in *Ehlert* on May 4, 1970 (No. 1383, this Term).

The Selective Service file introduced at trial showed that petitioner was classified I-A when he received his order to report for induction. He thereafter submitted, for the first time, a completed form seeking conscientious objector status. The local board indicated: "The information contained therein has been considered by this Board and it is of the opinion that the facts presented do not warrant the reopening or reclassification of your case at this time" (Tr. 21).

Petitioner raised claims in the courts below of the denial of due process as a result of the fact that the clerk of the local board did not advise him that (under 32 C.F.R. 1625.2; see Pet. 4) the board must find that there had been a change in his status resulting from circumstances beyond his control before it would be authorized to reopen his classification, and because he was directed to complete and return the conscientious objector form within five days. He also contended that the board's refusal to reopen his classification was improper. The court of appeals, following its decision in *Ehlert*, deemed it unnecessary to reach any of these contentions, since it had held in *Ehlert* that the alleged crystallization of conscientious objector beliefs was not a change in status resulting from circumstances beyond the registrant's control within the meaning of 32 C.F.R. 1625.2, so as to permit a local board to reopen a classification once the notice of induction has been mailed. Peti-

tioner in this Court seeks review of that holding, arguing that the regulation, as so construed, is not authorized by the Selective Service Act and is unconstitutional. Petitioner correctly points out that the courts of appeals are (and have been for some time) divided on the issue whether an alleged maturation of conscientious objector beliefs can properly be regarded as resulting from "circumstances over which the registrant had no control" under 32 C.F.R. 1625.2.

In *United States* v. *Holmes*, No. 1311, this Term, the government has filed a certiorari petition seeking review of the ruling of the Second Circuit allowing a registrant to raise, orally and for the first time, a claim of conscientious objector status at the induction station on the date of his scheduled induction. One of the issues presented in that petition is the proposition determined below in this case—whether after a notice of induction is mailed a local board has authority under the regulation to consider a claim of conscientious objection. Accordingly, we agree with the general assertion of petitioner that this question is of recurring importance to the evenhanded administration of the Selective Service System, and that review of this matter and resolution of the existing conflict among circuits is warranted. Moreover, the Court has now granted certiorari in the *Ehlert* case, where the identical issue is posed and on which the court below expressly predicated its decision. Since the Court has apparently determined that *Ehlert* is an appropriate vehicle for resolving that issue, and since the court below disposed of this case

by relying upon *Ehlert*, it would seem proper to defer action on the present petition until after *Ehlert* is decided.[1]

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

MAY 1970.

[1] We note, however, that the Selective Service file and trial transcript in this case make clear that the local board did not rely on the lack of cognizability of petitioner's conscientious objector claim. Rather, the board stated that it had considered petitioner's C.O. form and found that the "facts presented do not warrant * * * reopening." This finding was amply supported since, as petitioner's counsel conceded at trial, the C.O. form submitted by petitioner failed to show that his conscientious objector beliefs in fact had crystallized *after* the mailing of the induction notice (Tr. 19, 26-28).

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